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No. 736

# Supreme Court of the United States.

October Term, 1945.

JOHN D. LYON,  
*Petitioner,*

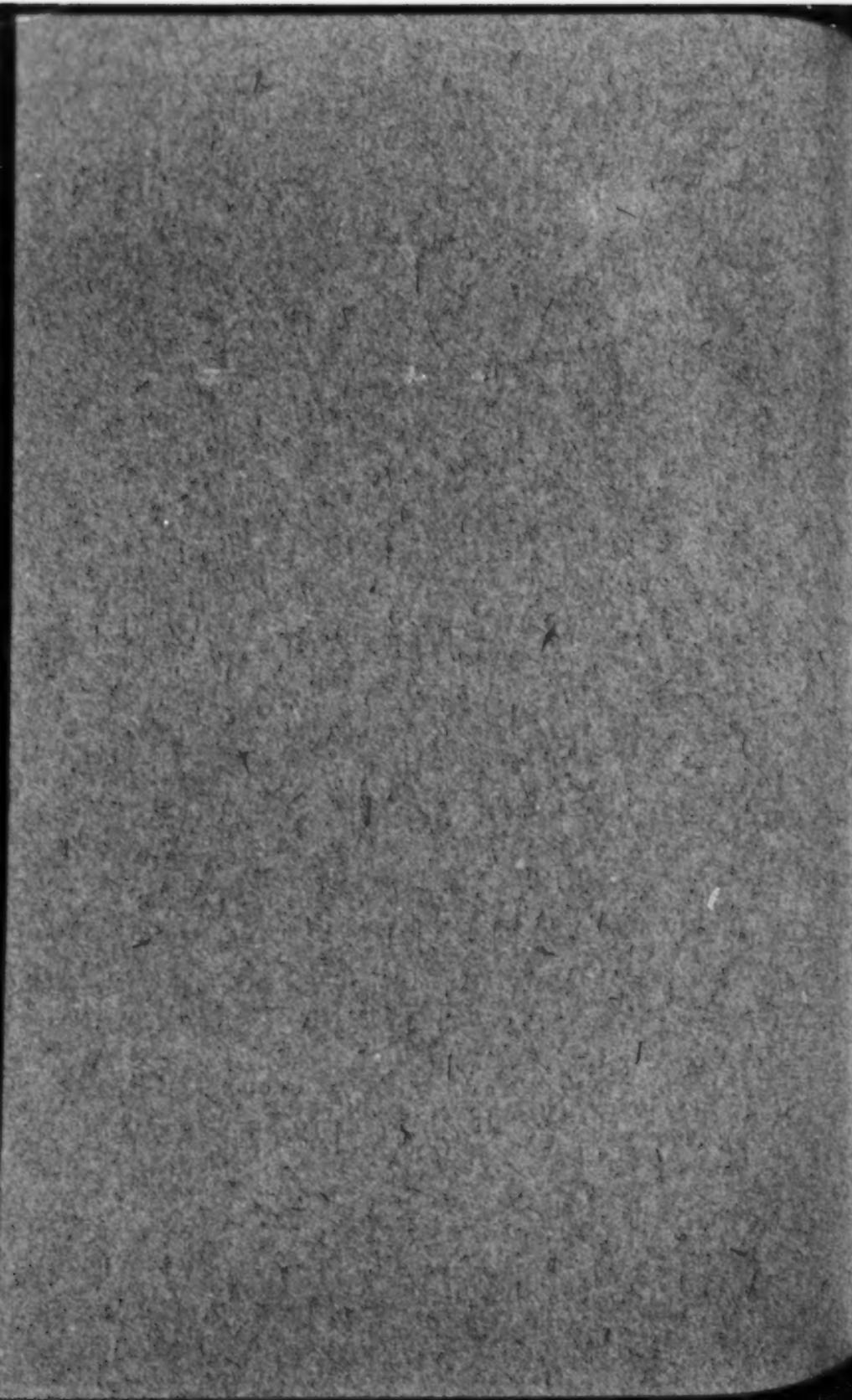
v.

JEROME K. HARKNESS,  
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SAMUEL A. MARGOLIS,  
Attorney for Petitioner.

MACNEIL AND MALONEY,  
Angus M. MacNeil,  
Of Counsel.



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# Supreme Court of the United States.

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OCTOBER TERM, 1945.

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JOHN D. LYON,  
*Petitioner,*  
*v.*

JEROME K. HARKNESS,  
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

Your petitioner respectfully submits his petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the First Circuit in the above-entitled case, numbered 4078 in the October, 1944, Term of said Court.

### 1. Statement of Matter Involved.

The petitioner, John D. Lyon, is a citizen and domiciliary of the State of Nevada prior to January of 1944. He was lawfully married to Marjorie S. Lyon, a domiciliary and resident of the Commonwealth of Massachusetts. On the 10th day of January, 1944, said John D. Lyon was divorced from said Marjorie S. Lyon by a decree entered in the

Eighth Judicial District Court of the State of Nevada in and for the County of Clark, a court of competent jurisdiction. Marjorie M. Lyon had previously been served with summons in said case in accordance with the laws of the State of Nevada, service having been made upon her in person (see transcript of record, page 30).

The judgment of divorce contained an order for the support of the children of said John D. Lyon and Marjorie M. Lyon.

On the 18th day of October, 1943, Marjorie S. Lyon otherwise known as Marjorie M. Lyon, filed a libel in the Probate Court in and for the County of Middlesex, Commonwealth of Massachusetts, seeking a divorce from John D. Lyon, the petitioner. On November 29, 1943, custody of the children of Marjorie S. Lyon and John D. Lyon was awarded to Marjorie S. Lyon by decree of the Probate Court of Middlesex County, Commonwealth of Massachusetts (see record, page 45).

Then, on February 11, 1944, the judge of the Probate Court for the Commonwealth of Massachusetts, Middlesex County, entered an order against John D. Lyon in the amount of \$35, to be paid each and every Saturday thereafter. No personal service of said divorce proceedings commenced in the Commonwealth of Massachusetts has been served upon John D. Lyon within the Commonwealth of Massachusetts.

John D. Lyon has faithfully complied with the terms of the order entered on January 10, 1944, in the Nevada court.

According to the record, John D. Lyon was not physically present within the Commonwealth of Massachusetts on or after the 12th day of January, 1944, the date alleged in the indictments (see transcript of record, page 5, par. 8, and the return to the writ, page 48).

On April 5, 1944, the Grand Jury of Middlesex County returned an indictment against John D. Lyon setting forth

substantially that he was criminally guilty of nonsupport, desertion, and abandonment of Marjorie S. Lyon and his children, John D. Lyon II and Stephanie Lyon, from January 20, 1944, until the date of the indictment, April 5, 1944 (see transcript of record, page 17).

Thereafter rendition proceedings, sometimes called extradition proceedings, were commenced in the Commonwealth of Massachusetts, and on the 29th day of December, 1944, the Governor of New Hampshire honored the request of the Governor of Massachusetts and ordered the warrant to be issued that would cause your petitioner to be delivered to the Commonwealth of Massachusetts or its agents.

On January 19, 1945, John D. Lyon applied to the Honorable Aloysius J. Connor, judge of the United States District Court for the District of New Hampshire, for a writ of habeas corpus. This writ was returnable to the United States District Court for the District of New Hampshire on January 19, 1945. A hearing was held on January 24, 1945 (the full transcript of the hearing being set forth in the record, starting at page 60).

On January 24th Judge Connor, without receiving evidence but upon reading the writ of habeas corpus, the petition for the writ, the return to the writ, and a motion filed by the petitioner, and argument of counsel (all of which are completely set forth in the transcript of record), ordered that the writ be discharged and the petitioner remanded to the custody of the respondent.

On January 25, 1945, the court filed his opinion with findings of fact. (This opinion is short and is set forth on page 53 of the transcript of record.) The opinion of the court contained the following statement: "It is a further finding of the Court that there existed no exceptional circumstances or peculiar urgency which would justify a departure from the rule requiring recourse to the state courts."

The case was appealed to the United States Circuit Court of Appeals for the First Circuit, and the court entered a judgment sustaining or affirming the order of the District Court on November 9, 1945 (as set forth on page 100 of the transcript of record); and on the same day it entered an opinion which contained the following statement: "Federal jurisdiction is just as delicate and interferes just as much with the criminal jurisdiction of the several states in one situation as it does in the other" (see transcript of record, page 100).

## **2. Jurisdiction.**

The jurisdiction of the United States Supreme Court is given by 28 U.S.C. sections 451 and 452, and the petitioner here is held in custody, and he alleges he is being so held in violation of rights given to him by the Federal Constitution. The petitioner contends that the Circuit Court of Appeals—

1. Decided this case in conflict with other decisions of the United States Supreme Court and in conflict with applicable decisions of other Federal Courts.
2. Decided an important question of Federal law which has not been, but should be, settled by this court.
3. Decided this question in violation of the provisions of the Constitution of the United States.

## **3. Questions Presented.**

The petitioner presents the following questions:

1. That in a case of the nature of that presented to the District Court of the United States for the District of New Hampshire in the case of *John D. Lyon v. Jerome K. Harkness* the petitioner has a right to have his case heard and disposed of on its merits by a court of the United States.

2. That no state executive or judicial department of a state should be empowered or trusted with the duty of determining the question of the validity of divorce proceedings in which the state, its citizens or inhabitants are not parties at interest.

3. That the State of New Hampshire has no authority in itself to hold John D. Lyon or deliver him to the Commonwealth of Massachusetts by its own authority, but can only act in rendition proceedings under the authority granted by the Constitution of the United States and the Acts of Congress.

4. That no rule of court exists such as set forth in the opinion of the judge of the District Court of New Hampshire (as set forth on page 55 of the transcript of record, line 1, or as set forth in the opinion of the Circuit Court of Appeals for the First Circuit, as contained in the transcript of record, pages 97 to 100, inclusive).

5. That the petitioner is not substantially charged with a crime cognizable under the laws of Massachusetts.

6. That the petitioner is not a fugitive from justice.

7. That the applicant has a full and complete remedy in the Federal courts for habeas corpus in this case and is not obliged to proceed to protect his rights before a New Hampshire court of record.

8. That there is no requirement that the applicant exhaust his remedies in the New Hampshire state courts before applying for habeas corpus to the Federal courts.

9. That the Governor of the State of New Hampshire and the Federal District Court of New Hampshire had no duty to inquire into the validity of the divorce decree set up in the pleadings, but were obliged by United States law to give full faith and credit to this decree without further inquiry into the matters decided by the courts of the State of Nevada.

10. That the Federal courts could not validly and legally state, in view of the Massachusetts laws, that John D. Lyon would have an opportunity to compel recognition of his constitutional rights in Massachusetts before the Massachusetts courts.

11. That in this proceeding there are substantial Federal Constitutional questions involved.

12. That the alleged act with which the applicant is charged is not a crime under the Massachusetts laws.

13. That, if proved as alleged that John D. Lyon was not within the Commonwealth of Massachusetts at the times alleged in the indictment even if a crime were alleged, he could not be extradited or be the subject of rendition from New Hampshire to Massachusetts in accordance with proceedings upon which this case is based.

14. That, if the facts alleged by John D. Lyon in his application for a writ of habeas corpus are sustained, a writ of habeas corpus must issue and must be sustained.

15. That the respondent has not denied in his return to the writ allegations which would prevent John D. Lyon from maintaining his application for a writ of habeas corpus.

16. That John D. Lyon's right to a writ of habeas corpus arises from the Constitution of the United States and is not dependent upon the statutes of the State of New Hampshire.

17. That, the respondent not having denied the fact alleged by the applicant that the applicant was not within the State of Massachusetts and did not leave the State of Massachusetts within the times set forth in the indictment, he is therefore not a fugitive from justice, and therefore is entitled to have a writ of habeas corpus issued and sustained.

18. That John D. Lyon is entitled to have the Federal courts determine the essential allegations made by him in

his petition for a writ of habeas corpus if any of the essential facts are denied by the respondent in his return.

19. That the criminal courts of Massachusetts have no authority to enforce the orders of the Probate Courts of Massachusetts in so far as they affect this case, nor do the criminal courts of Massachusetts have any jurisdiction or authority to enforce the orders contained in the judgment of divorce entered in the judgment referred to from the Nevada Courts.

#### **4. Reasons Relied on for Allowance of Writ.**

The petitioner sets forth the following reasons for the allowance of the writ:

1. The action of the judge of the District Court and the action of the Circuit Court of Appeals in dismissing the writ of habeas corpus are a direct violation of the Constitution of the United States guaranteeing to all citizens of the United States freedom and liberty. The District Court erred when it entered his order upon his opinion that there existed a rule requiring recourse in this type of action to the state court.

2. The judge of the District Court and the Circuit Court of Appeals erred in considering the case as being one in which the petitioner is being held by state authority (see transcript of record, page 99, par. 3).

3. The return of a fugitive from one state to another is governed by the Constitution of the United States and the Acts of Congress past pursuant thereto. The Constitution of the United States, article 4, section 2, clause 2, and the statutory laws of the United States govern exclusively the rights of one state to demand and the obligation of another state upon demand made to surrender fugitives. Article 1, section 10, of the Constitution of the United States removes any rights of the several states to make treaties or agree-

ments amongst themselves, and the only authority under which a fugitive from justice may be held is the authority of the United States.

4. The laws of the Commonwealth of Massachusetts recognize no crime of nonsupport, desertion or abandonment of wife or minor children in cases in which divorce proceedings have been commenced and custody of children has been awarded and orders for support have been entered in the Probate Court of Massachusetts.

5. The Governor and the Executive Department of the Commonwealth of Massachusetts, in the absence of evidence to the contrary, are obliged to give full faith and credit to the judicial decree of the courts of the State of Nevada in the action of *John D. Lyon v. Marjorie M. Lyon*.

6. The Governor of the State of New Hampshire, under the laws of the United States and under the laws of the State of New Hampshire, cannot inquire into the validity of the decree of the court of the State of Nevada, and cannot take evidence upon which he can base his action or his opinion concerning the validity of the judgment issued from the state court of Nevada.

7. As between an indictment returned from the state courts of Massachusetts and a judgment entered in the state courts of Nevada, the Governor of New Hampshire must give full faith and credit to the judgment of the state court of Nevada, and, as necessary to give such full faith and credit, must disregard the alleged indictment returned by the state court of Massachusetts.

8. The Governor of New Hampshire, having the knowledge that John D. Lyon was not within the Commonwealth of Massachusetts on the alleged date of the commission of the alleged crime or thereafter, was obliged to recognize that John D. Lyon was not a fugitive from justice.

9. John D. Lyon, having legally absented himself from Massachusetts, is entitled, under the Constitution of the

United States, to live free from any obligation of returning to Massachusetts.

10. The United States Circuit Court of Appeals and the District Court of the United States for the District of New Hampshire have erroneously considered that a person held under a Governor's warrant in rendition proceedings is held by state authority and becomes subject to the rule of court that applies to the interference of Federal courts when a person is held by state court authority as such.

#### 5. Prayer for Writ.

Wherefore your petitioner respectfully prays:

1. That a writ of certiorari issue out of and under the seal of this Honorable Court to review the decision of the Circuit Court of Appeals for the First Circuit in the above case.
2. That the judgment of the Circuit Court of Appeals for the First Circuit in the above case be vacated.
3. That the Circuit Court of Appeals for the First Circuit be directed to issue and sustain the petitioner's petition for a writ of habeas corpus.
3. That a writ of certiorari issue and that he be allowed to have the Supreme Court of the United States pass upon his right to have issued a writ of habeas corpus protecting him from delivery to the Commonwealth of Massachusetts.
5. For such other and further relief in the premises as to this Honorable Court may seem proper.

JOHN D. LYON,

By his Attorney,

SAMUEL A. MARGOLIS.

MACNEIL AND MALONEY,

ANGUS M. MACNEIL,

Of Counsel.

# Supreme Court of the United States.

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OCTOBER TERM, 1945.

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JOHN D. LYON,  
*Petitioner,*

*v.*

JEROME K. HARKNESS,  
*Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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### **Opinions Below.**

The opinion of the District Court for the District of New Hampshire relating to the issue presented by this petition is to be found in the record, at pages 53 to 55.

The opinion of the Circuit Court of Appeals for the First Circuit affirming the judgment of the District Court is to be found in the record, at pages 97 to 100.

### **Jurisdiction.**

The judgment of the Circuit Court of Appeals for the First Circuit affirming the District Court's decision was entered on November 5, 1945 (record, page 100).

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended, United States Code, title 28, section 347(a).

### **Statement of Facts.**

The facts have been stated in the foregoing petition.

### **Specification of Errors.**

It is submitted that the Circuit Court of Appeals erred—

1. In ruling that the law of the United States or the rules of court removed from the jurisdiction of the District Courts of the United States petitions for writ of habeas corpus in cases in which the petitioner was not held under state court process until all available remedies have been exhausted.
2. In affirming the judgment of the District Court.
3. In denying the petitioner's prayer for writ of habeas corpus.

### **Argument.**

The Circuit Court of Appeals erred in ruling that the law of the United States or the rules of court removed from the jurisdiction of the District Courts of the United States petitions for writ of habeas corpus in cases in which the petitioner was not held under state court process until all available remedies have been exhausted.

*First:* Upon this question the United States Code has given to the judges and justices of the District Courts, the Circuit Court of Appeals and the Supreme Court jurisdiction of the issuance of writs of habeas corpus (28 U.S.C. sections 451, 452).

The Supreme Court of the United States in the case of *Roberts v. Reilly*, 116 U.S. 80, holds that a fugitive is entitled by writ of habeas corpus to demand the judgment of the United States courts on the lawfulness of his arrest and imprisonment. (See also *Robb v. Connolly*, 111 U.S. 624.)

The petitioner is not held under state court authority, but is held under the authority of the United States (*Lascelles v. Georgia*, 148 U.S. 537, 541).

No state has the authority to make treaties with another state (*Rhode Island v. Massachusetts*, 12 Pet. 657, 724; see also article 1, section 10, of the Constitution of the United States).

*Second:* The Circuit Court of Appeals erred in affirming the judgment of the District Court.

A. The petitioner is not charged with a crime cognizable under the laws of Massachusetts.

“So long as such a decree is in effect a father does not have the right to custody of his child and is not under the obligation to provide for his support other than to make the payments for his support ordered by the decree” (*Barry v. Sparks*, 306 Mass. 80, 83).

This obligation the superior courts (courts of criminal jurisdiction) are not authorized to enforce (*Lyon v. Lyon*, 1945 Mass. Adv. Sh. 1087; 63 N.E. (2d) 459, 460).

As stated in the “Report on Criminal Remedies in Massachusetts for Failure to Furnish Support,” by the Association of Justices, at page 16: “Under the Massachusetts rule, the taking of custody from the father appears to terminate the common law obligation, and the only obligation remaining upon him is that which may arise from

the decree of the court awarding the custody. *Ryder v. Perkins*, 219 Mass. 525. That obligation the criminal courts are not authorized to enforce. In order to preserve the criminal remedy, the wife, in divorce or separate support proceedings, will often do well to avoid taking a decree for custody. *Gilley v. Gilley*, 79 Me. 292. *Glynn v. Glynn*, 94 Me. 465."

B. The petitioner is not a fugitive from justice, not having been present in Massachusetts at the time of the commission of the crime or thereafter, and not having left Massachusetts subsequently to the commission of the crime (see United States Constitution, article 4, par. 2; *Ex parte Montgomery*, 244 Fed. 967; *Hyatt v. The People of the State of New York*, 188 U.S. 691; *Innes v. Tobin*, 240 U.S. 127).

C. The District Court of the United States protects the petitioner from rendition if he is charged with acts which do not constitute crimes under the laws of Massachusetts (*Hard v. Splaine*, 45 D.C. Apps. 1).

D. The Governor of New Hampshire and the judge of the District Court for the District of New Hampshire are obliged to recognize the divorce judgment issued from the court of the State of Nevada referred to in the petition (see United States Constitution, article IV, section 1, which obliges state and federal authorities to give full faith and credit to the just determinations of courts of the United States). This provision of the Constitution of the United States is supported by the case of *Esenwein v. Commonwealth, ex rel. Esemwine*, 325 U.S. 279, in the absence of evidence tending to impeach the judgment. Further, neither the Governor of New Hampshire nor the judge of the District Court of the United States for the District of New Hampshire had any authority to, and in fact neither

did, receive evidence impeaching said judgment issuing from the state courts of Nevada, and therefore the divorce between John D. Lyon and Marjorie M. Lyon must be recognized and accepted by both the Governor of New Hampshire and the judge of the District Court of the United States for the District of New Hampshire, and therefore there could not be a crime committed by John D. Lyon of failure to support Marjorie M. Lyon, a woman alleged to be his wife but by virtue of the law no longer his wife, and therefore John D. Lyon could not be extradited from the State of New Hampshire to the Commonwealth of Massachusetts because of any failure on his part to support Marjorie M. Lyon or his children, Stephanie B. Lyon and John D. Lyon II.

### **Conclusion.**

For the reasons above given and especially for the following:

First, that during the pendency of divorce proceedings and thereafter a man has no obligation of support of his wife and children under the laws of Massachusetts except to comply with the orders of the divorce court in Massachusetts, either the Probate Court, a civil court, or the Superior Court in civil sessions. He has no obligations under the criminal law to support his wife and children during the pendency of divorce proceedings, and the Governor of New Hampshire and the Federal courts must recognize the proceedings pending in the Probate Court of Massachusetts, a civil court (record, pages 44 to 47, inclusive). Further, if he could commit such a crime, he did not commit it, for the reason that Marjorie M. Lyon was not his wife and the children were provided for by the judgment of the District Court of the State of Nevada, compliance with the provisions of said judgment not having

been denied by return to the petition for habeas corpus, and full recognition of said divorce must be given under the provisions of the United States law and the further law that the Governor of the demanded state and the judge of the Federal District Court cannot receive evidence and make any determinations concerning the validity of said judgment, but must give full faith and credit to this judgment on habeas corpus proceedings. Further, the petitioner was not a fugitive from justice according to his petition, which was not denied by the return to the writ, and if it were to have been denied by the return to the writ he was entitled to trial on the merits of his position in respect to the question of whether he was a fugitive from justice or not. This trial he was denied by the action of the District Court dismissing the writ upon motion of the respondent solely on arguments. In conclusion, the petitioner maintains that he has a full right to a judgment on the merits of his petition from a court of competent jurisdiction of the United States and is not obliged to submit himself to the jurisdiction of the state courts of the State of New Hampshire.

It is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,  
SAMUEL A. MARGOLIS.

MACNEIL AND MALONEY,  
ANGUS MACNEIL,

Of Counsel.



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FEB 4 1946

GENERAL ELECTRIC COMPANY  
OLE

STANDARD OIL COMPANY OF THE UNITED STATES

DETROIT, MICHIGAN, 1945.

NO. 725

JOHN D. LEWIS

President

JEROME K. HARRINGTON

Secretary

ATTORNEY FOR THE COMPANY

RESPONDENT'S STATEMENT OF DISAGGREGATION

JEROME K. HARRINGTON

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# Supreme Court of the United States

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OCTOBER TERM, 1945.

No. 736

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JOHN D. LYON,  
*Petitioner,*

v.

JEROME K. HARKNESS,  
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI RESPONDENT'S STATEMENT OPPOSING JURISDICTION

Pursuant to paragraph 3 of Rule 38 of the Rules of the Supreme Court of the United States, comes now Jerome K. Harkness, respondent, in the above entitled case and presents the following matter making against the exercise of jurisdiction of the Supreme Court of the United States as asserted in petition for writ of *certiorari* and brief in support thereof filed by the petitioner on January 14, 1946.

### Opinions Below

The opinion of the District Court for the District of New Hampshire in this case will be found in 58 Fed. Supp. 746 and in the Transcript of Record, page 53.

The opinion of the Circuit Court of Appeals for the First Circuit affirming the order of the District Court will be found in 151 F. (2d) 731.

## Jurisdiction

The jurisdiction of this Court is invoked by petitioner under the provisions of 28 U.S.C.A. s. 347 (a).

## Statement of the Case

This case involves *habeas corpus* proceedings initiated in the Federal District Court of New Hampshire by which the petitioner sought to secure his release from custody imposed upon him by virtue of a warrant issued by the Governor of New Hampshire in extradition proceedings honoring the request of the Governor of Massachusetts that the petitioner be returned to Massachusetts to answer six counts of an indictment for nonsupport, desertion, and abandonment of his wife and two minor children.

The petitioner, who had obtained a Nevada divorce eight days prior to the Massachusetts indictment, alleged that he was being held in violation of rights guaranteed to him by the *Full Faith* and *Credit* clause of the Federal Constitution.

The District Court found that the petitioner had made no application for any judicial remedy afforded by the state, that no good reason appeared for his failure to do so and that no exceptional circumstances of peculiar urgency existed to justify a departure from the rule requiring the exhaustion of judicial remedies afforded by the state courts. (R. 54-55).

Upon motion made by respondent the District Court ordered that the writ be discharged and the petitioner remanded to the custody of the respondent.

On appeal the Circuit Court of Appeals for the First Circuit affirmed the order of the District Court on the ground that, although the District Court has jurisdiction of *habeas corpus* proceedings wherein a petitioner alleges that he is being held in state custody in violation of federal rights, such court is under no duty to exercise this jurisdiction and will not ordinarily do so until all available state remedies have been exhausted.

## Argument

*It is Submitted that Certiorari Should be Denied on the Following Grounds:*

A. The petitioner in giving the reasons relied upon for the granting of *certiorari* does not allege that the decision of the Circuit Court of Appeals for the First Circuit in this case is in conflict with any decision of any other Circuit Court of Appeals on the question whether available judicial state remedies ought to be exhausted in *habeas corpus* proceedings before having recourse to the federal courts. No such conflict appears to exist.

B. It is now well settled in the Federal Courts that prior exhaustion of state judicial remedies is required in *habeas corpus* proceedings. *White v. Ragen*, 324 U. S. 760, 89 L.Ed. 932, 65 S.Ct. 978. *House v. Mayo*, 324 U.S. 42, 89 L.Ed. 528, 65 S.Ct. 517. *Ex parte Hawk*, 321 U.S. 114, 88 L.Ed. 574, 64 S.Ct. 448 (1944). *Wilson v. Lanagan* (1938, C.C.A. 1st), 99 F. (2d) 544 (*certiorari* denied in (1939) 306 U.S. 634, 85 L.Ed. 1035, 59 S.Ct. 486).

C. The petitioner has not alleged any reasons of the character described in subdivision (b) paragraph 5 of Rule 38 of the Rules of the United States Supreme Court, which, although not controlling, are generally considered as justifying review on writ of *certiorari* of decisions of Circuit Courts of Appeals.

D. Most of the petitioner's contentions outlined in his petition and brief go to the merits of the controversy relating to the lawfulness or unlawfulness of his detention and to his guilt or innocence of nonsupport. The procedural issue whether the *proper judicial forum* for a hearing on his application for *habeas corpus* at this stage of the proceedings is the federal or state courts is not met with any degree of clearness.

E. The judicial remedy of *habeas corpus* was available to the petitioner in the New Hampshire state courts. The New Hampshire Constitution, Part Second, Art. 91, provides:

"Art. 91. The privilege and benefit of the *habeas corpus*,

shall be enjoyed in this state, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a time not exceeding three months."

To implement this constitutional guaranty the New Hampshire Legislature years ago enacted an *habeas corpus* act (R.L. (1942) c. 406), to which the petitioner could have resorted for relief. In addition to this general act, section 10 of chapter 437 of the Revised Laws (1942) of New Hampshire provides more specially for the *habeas corpus* remedy in extradition cases by application for a writ before a judge of a court of record. That section provides:

"10. Rights of Accused Person; Application for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of *habeas corpus*. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state."

### Conclusion

The rule is that there has not been an exhaustion of state judicial remedies so as to entitle the petitioner to *habeas corpus* in a federal court, where *habeas corpus* was available in the state courts, but has not been sought or carried to a conclusion.

*Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340, 98 A.L.R. 406.

In *Waley v. Johnston*, 316 U.S. 101, 104, 105, 86 L.Ed. 1302, 1304, 1305, 62 S.Ct. 964, it was pointed out that the writ is an appropriate remedy in the federal courts in "those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused and where the writ is the only effective means of preserving his rights." In the case at bar no justification has been shown to exist for cutting short the state corrective processes in favor of interference by a federal court. The writ of *habeas corpus* is an extraordinary remedy which the federal courts in their discretion will not apply if no rights under federal law or the Constitution have been violated. Even if such violations exist, the federal courts will not exercise their power unless the state remedies have been exhausted, save in very rare circumstances of pressing urgency not present here.

It is respectfully submitted that the petitioner's petition for *certiorari* be denied.

Respectfully submitted,

FRANK R. KENISON,  
Attorney General,  
Concord, New Hampshire.

ERNEST R. D'AMOURS  
Assistant Attorney-General  
Concord, New Hampshire  
Of Counsel.